Supreme Court, U.S.
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No. 86-1036

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

DOUBLE RAINBOW GOURMET ICE CREAMS, INC.,
Petitioner,

VS.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA,
THE PILLSBURY COMPANY, and
THE HÄAGEN-DAZS COMPANY, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the district court abuse its discretion in disqualifying one of petitioner's law firms on the basis of deposition testimony and exhibits, affidavits and oral argument, and in declining to accept additional oral testimony at the hearing when the proposed testimony would not have added anything to the evidentiary record?

2. Did the district court abuse its discretion in ruling that disqualification was not avoided by a "Chinese Wall" which was created well after the disqualified law firm became aware of the conflict and after it had been asked to disqualify itself?

STATEMENT REQUIRED BY SUPREME COURT RULE 28.1

Respondent The Pillsbury Company has the following non-wholly owned subsidiaries and affiliates: Chemicals Marketing and Transportation, Inc.; Midwest Processing Company; Gringoire-Brossard S.A.; Snow Brand Pillsbury Inc.; Sino-American Great Wall Food Industrial Co., Ltd.; Sino-American Great Wall Enterprise Co., Ltd.; Amoy Industries Limited; ETA Foods Limited; and Häagen-Dazs Japan, Inc. It has no parent companies.

Respondent The Häagen-Dazs Company, Inc., is a wholly owned subsidiary of respondent The Pillsbury Company. It has no non-wholly owned subsidiaries or affiliates.

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PRELIMINARY STATEMENT

This case presents no novel issue, no conflict with decisions of this Court, no conflict among the circuits, nor any other matter worthy of this Court's attention. Indeed, the petition presents a purely factual question: whether the district court correctly ruled that an attorney who worked for ten years in the law department of respondent The Pillsbury Company ("Pillsbury") was disqualified to serve as opposing counsel in antitrust litigation against Pillsbury. Documents, deposition testimony and affidavits demonstrated that the attorney had access to and knowledge of matters directly and substantially related to the subject matter of the

underlying lawsuit. Petitioner, through general and equivocal denials, sought but failed to refute that showing. The district court therefore properly disqualified the attorney and the law firm by which he is employed. Oral testimony would have added nothing to the record before the district court, and therefore that court did not abuse its discretion by declining to hear it.

SUMMARY OF THE CASE

Pillsbury's subsidiary, The Häagen-Dazs Company, Inc. ("Häagen-Dazs"), manufactures and sells ice cream on a nationwide basis and competes with petitioner Double Rainbow Gourmet Ice Creams, Inc. ("Double Rainbow"), which manufactures and markets its own brand of ice cream. The central issue in the underlying litigation is whether Häagen-Dazs' distribution policies, particularly its unilaterally adopted and implemented policy of refusing to deal with distributors who handle competing products, violate the antitrust laws.[1]

Respondents Pillsbury and Häagen-Dazs moved to disqualify petitioner's counsel based on the past and present employment of Franklin C. Jesse, an attorney formerly employed as in-house counsel in Pillsbury's Law Department and currently associated with Double Rainbow's Minnesota counsel, Gray, Plant, Mooty, Mooty & Bennett ("Gray, Plant"). Mr. Jesse worked in the Pillsbury Law Department from 1974 until October 1984 and held a variety of high-ranking positions, including Senior Attorney, International Group Counsel, and Senior Corporate Counsel; in addition, he was a member of the Law Department's adminis-

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[1] This litigation, *In Re Super Premium Ice Cream Distribution Antitrust Litigation* (MDL Docket No. 682), consists of four cases involving a number of competing ice cream manufacturers and a former Häagen-Dazs distributor: *The Häagen-Dazs Company, Inc., et al. v. Double Rainbow Gourmet Ice Creams, Inc., et al.* (N.D.Cal. No. C-85-6553 CAL); *The Häagen-Dazs Company, Inc., et al. v. Perché No! Gelato, Inc.* (N.D.Cal. No. C-85-5819 CAL); *Double Rainbow Gourmet Ice Creams, Inc. v. The Pillsbury Company, et al.* (N.D.Cal. No. C-86-0583 CAL); and *Perché No! Gelato, Inc. v. The Haagen-Dazs Company, Inc., et al.* (N.D.Cal. No. C-86-4424 CAL).

tration committee -the body responsible for overseeing all legal affairs of Pillsbury and its subsidiaries (Jesse Aff., p. 7, lines 5-10; Lund Aff., p. 2, lines 20-24; p. 3, line 21 to p. 4, line 8).

After Pillsbury acquired Häagen-Dazs in 1983, Mr. Jesse's principal assignment in the Law Department was to establish a joint venture in Japan, the purpose of which was to duplicate, so far as possible, Häagen-Dazs' operations in the United States, including franchising and distribution (Lund Aff., p. 5, line 7 to p. 7, line 3). The joint venture agreement ultimately negotiated by Mr. Jesse contained an exclusive dealing provision substantially identical to Häagen-Dazs' domestic policy at issue in the underlying litigation (Miller Supp.Aff., Exh. 22; *The Häagen-Dazs Company, Inc. v. Double Rainbow Gourmet Ice Creams, Inc.* (N.D.Cal. No. C-85-6553 CAL), Compl., ¶ 6). The evidentiary record, including deposition testimony, established that Mr. Jesse was required to learn about Häagen-Dazs' domestic policies and operations in order to carry out the joint venture assignment (Lund Aff., p. 6, lines 1-4; Wegener Aff., p. 9, lines 11-14; Lund Dep.Tr., pp. 16, 18, 73-74).

During his tenure, Mr. Jesse also had significant contact with Pillsbury's management during the formation of its strategies for the acquisition of Häagen-Dazs and the marketing of ice cream, and he was exposed to management's and the Law Department's consideration of Häagen-Dazs' distribution policies (Lund Aff., p. 8, line 9 to p. 9, line 16; Wegener Aff., p. 5, line 14 to p. 9, line 5; Lund Dep.Tr., pp. 11-19, 41-43; Wegener Dep.Tr., pp. 62-67). Mr. Jesse was in the Law Department in 1984 at the time the department defended a suit brought by Ben & Jerry's Homemade, Inc., another ice cream manufacturer, which involved issues identical to those raised in the present litigation (Lund Aff., p. 7, line 4 to p. 8, line 8; Wegener Aff., p. 3, line 8 to p. 9, line 5; Lund Dep.Tr., pp. 15-19, 25-26, 41-43, 53-54; Wegener Dep.Tr., pp. 28-32, 45-63, 73-77).

Mr. Jesse joined Gray, Plant in November 1984 as an associate "International Counsel" (Jesse Aff., p. 3, lines 13-24). Alioto & Alioto, Double Rainbow's California counsel, first contacted Gray, Plant concerning this litigation in August 1985 and asked Gray, Plant to join it as co-counsel (Jesse Aff., Exh. 2, item 3p.).

Gray, Plant had never served as counsel for Double Rainbow prior to this action (id., item 4x.). Shortly thereafter, Daniel R. Shulman, one of the Gray, Plant attorneys involved in this litigation, spoke with Mr. Jesse regarding the potential conflict (Jesse Aff., p. 4, line 16 to p. 5, line 2). Double Rainbow's complaint was filed on August 30, 1985. Gray, Plant was formally associated in the litigation in mid-September 1985, and respondents' attorneys asked Gray, Plant to withdraw at the end of October, immediately upon learning of the conflict (Jesse Aff., Exh. 2, item 4v.; Miller Aff., p. 2, line 7 to p. 3, line 24). Gray, Plant declined to do so (Miller Aff., Exh. C), but instead instituted purported "screening procedures," intended to seal off all files and information relating to this litigation from Mr. Jesse, in November 1985—months after the litigation was initiated and well after Gray, Plant was aware of the potential conflict (Jesse Aff., p. 6, lines 11-25, and Exh. 3). The motion for disqualification of both Gray, Plant and its closely associated California co-counsel, Alioto & Alioto, was filed on December 13, 1985.

The evidentiary record presented to the district court on the motion was voluminous and comprehensive. It included the deposition transcripts of Ronald E. Lund, Vice President and Associate General Counsel of Pillsbury, Richard J. Wegener, in-house counsel for Pillsbury, twenty-one deposition exhibits, two declarations by Mr. Jesse, two declarations by William C. Miller, counsel for respondents, and the declarations of Kevin Hurley, President and Chief Executive Officer of Häagen-Dazs, Mr. Shulman, Mr. Lund and Mr. Wegener.[2]

The district court found that:

> "[W]hile at Pillsbury, Mr. Jesse worked on matters substantially related to this litigation, and * * * there is a reasonable basis for concluding that he received confidential information relevant to this litigation.

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[2] The depositions of Lund and Wegener were taken by Double Rainbow's counsel and were made part of the record along with the deposition exhibits. The depositions provided petitioner with every opportunity to "cross-examine the movants' witnesses" (see Pet., p. 15).

> "* * * The record here discloses substantial similarities in the legal employments of Mr. Jesse and the legal and business matters involved in those employments. While Mr. Jesse and the Gray firm have attempted to show that his distribution-related work was limited to international matters, it appears that Mr. Jesse had information concerning Häagen-Dazs' domestic distribution strategies as well" (Pet.Appx., p. A-10).

Having disqualified Mr. Jesse, the district court concluded that his present employer must also be disqualified, rejecting petitioner's contention that its purported "screening procedures" precluded disqualification:

> "In light of the fact that the screening procedures were not instituted until after the litigation commenced, and one year after Mr. Jesse's employment, the court concludes that Double Rainbow's 'Chinese Wall' defense will not insulate the firm from disqualification" (Pet.Appx., p. A-13).

The district court, however, declined to disqualify co-counsel Alioto & Alioto (Pet.Appx., pp. A-13 to A-14).

The Court of Appeals for the Ninth Circuit denied Double Rainbow's petition for a writ of mandamus (Pet.Appx., p. A-1).

ARGUMENT

I. THE DISTRICT COURT PROPERLY APPLIED THE LONG-SETTLED STANDARDS GOVERNING DISQUALIFICATION OF COUNSEL.

Double Rainbow asserts that, because "[i]n *Richardson-Merrell* [*Inc. v. Roller* (1985) 472 U.S. 424], this Court effectively blocked appellate review of disqualification orders," there is a need for this Court to set forth standards for disqualification orders (Pet., p. 11). This is a non sequitur. The standards governing disqualification, particularly the "substantial relationship" test, are well settled and are not a matter of conflict among the various courts (see, e.g., *Trone v. Smith* (9 Cir. 1980) 621 F.2d 994, 998-999; *Smith v. Whatcott* (10 Cir. 1985) 757 F.2d

1098, 1100).[3] Indeed, Double Rainbow concedes that it "has no quarrel" with those rules (Pet., p. 13).

It is obvious that what Double Rainbow is really complaining about is this Court's decision in *Richardson-Merrell* concerning the *availability* of appellate review, not the standards for disqualification. No good reason exists to overturn this Court's decision in *Richardson-Merrell,* and Double Rainbow advances none. Rather, Double Rainbow frankly seeks review of the district court's findings, conceding that "highly factual matters" and "a factually intensive inquiry" are involved (see Pet., pp. 13-15). The Ninth Circuit has already considered that argument, and it concluded that "[t]he district court's order granting the motion to disqualify is not clearly erroneous" (Pet.Appx., p. A-1).

II. THE DECISIONS BELOW CORRECTLY CONCLUDED THAT NO EVIDENTIARY HEARING WAS REQUIRED.

The district court was presented with an extensive and comprehensive evidentiary record on the disqualification motion. Notably, Double Rainbow does not deny that the evidence adduced by respondents showed that Mr. Jesse should be disqualified (see

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[3] In fact, Rule 1.9(a) of the American Bar Association Model Rules of Professional Conduct (1983) specifically incorporates the substantial relationship test into its standards governing disqualification:

> "A lawyer who has formerly represented a client in a matter shall not thereafter:
>
> "(a) represent another person in the same or *a substantially related matter* in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation" (emphasis added).

A substantial relationship exists "if the factual contexts of the two representations are similar or related," and identity of issues presented by the two representations is *not* the test (*Trone v. Smith* (9 Cir. 1980) 621 F.2d 994, 998, 1000). There is no requirement that the former client prove the specific confidential information that may have been or could be disclosed (*Chugach Elec. Ass'n v. United States D.C. for Dist. of Alaska* (9 Cir. 1966) 370 F.2d 441, certiorari denied (1967) 389 U.S. 820).

Pet., pp. 13-15, 16). Rather, Double Rainbow contends that the district court abused its discretion in determining that Mr. Jesse had access to and knowledge of matters directly and substantially related to this lawsuit, despite the district court's statement that it would accept the factual averments of Mr. Jesse's affidavits as true (Pet., p. 15).

The district court, however, was not bound under any circumstances to accept Mr. Jesse's conclusionary assertions that he did not work on any matter bearing a substantial relationship to this litigation. Moreover, Double Rainbow fails to advise this Court (1) that the uncontroverted record (including unchallenged documents) demonstrates that Mr. Jesse was involved in substantially related matters, and (2) that Mr. Jesse's "denials" of *specific* facts were so equivocal, and sometimes contradictory, as to be meaningless.

As Double Rainbow emphasizes, Mr. Jesse did deny generally that he had knowledge of Häagen-Dazs' domestic distribution arrangements (see Jesse Aff., p. 8, lines 18-23).[4] Documentary evidence proved, however, that the Japanese joint venture agreement that Mr. Jesse drafted contained an exclusive dealing provision substantially identical to the policy at issue in the underlying litigation (Miller Supp.Aff., Exh. 22; see *The Häagen-Dazs Company, Inc. v. Double Rainbow Gourmet Ice Creams, Inc.*, supra, Compl., ¶ 6). In addition, documents and deposition testimony demonstrated that Mr. Jesse had access to internal Pillsbury legal documents analyzing the domestic distribution policy; that same evidence also showed that he attended meetings at which the domestic policy was discussed generally as well as specifically in regard to litigation brought by Ben & Jerry's Homemade, Inc., which involved issues identical to those in the underlying litigation (Lund Aff., p. 7, line 4 to p. 9, line 16; Wegener Aff., p. 3, line 8 to p. 9, line 5; Lund Dep.Tr., pp. 11-19, 25-26, 41-43, 53-54; Wegener Dep.Tr., pp. 28-32, 45-63, 73-77).

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[4] That general denial was shortly thereafter qualified by the statement that "to the best of my recollection" Mr. Jesse did not obtain any such knowledge (id., p. 8, line 27 to p. 9, line 4).

If Mr. Jesse's denials were to have any meaning, then obviously they should have addressed and refuted those specific matters. However, Mr. Jesse's denials were equivocal and contradictory. With respect to documents to which he had access, Mr. Jesse asserted simultaneously that (1) he "did not make a practice of reviewing the file," and (2) he did "not recall seeing" any related materials in it (Jesse Aff., p. 20, lines 2-6). Similarly, with respect to other reports, Mr. Jesse asserted both that "I have no recollection of the contents of any of those reports" (id., p. 20, lines 20-23) and that, "[i]n those reports, I saw nothing of any confidential nature" (id., p. 20, lines 14-16).

Although Mr. Jesse denied that he was present at *some* meetings of Pillsbury's legal staff, *he did not deny that he was present at meetings at which matters substantially related to this lawsuit were discussed.* Rather, Mr. Jesse simply suffered from a lack of recall that such events had occurred or that he was present when they did occur.[5] In addition, in one critical respect, Mr. Jesse's denials were pregnant with admission:

> "Mr. Hurley did not explain the domestic business to me *in great detail,* nor did I learn or endeavor to learn about the domestic business *in great detail*" (Jesse Aff., p. 10, lines 2-4) (emphasis added).

Under these circumstances, it is frivolous of Double Rainbow to contend that the district court "ignored" Mr. Jesse's "denials." The "denials" were meaningless. It is likewise frivolous to assert that the district court abused its discretion in declining to hear oral testimony to test credibility. Double Rainbow did not assert

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[5] For example, Mr. Jesse was present at a specific discussion of the Ben & Jerry's antitrust litigation that occurred on September 12, 1984 (Wegener Dep.Tr., pp. 45-62, 73-77; Dep.Exhs. 13, 16). Mr. Jesse did not deny this; instead, he averred that "I have no recollection whatsoever of the presentation" (Jesse Aff., p. 22, lines 11-12). There are a substantial number of similar incidents of lack of recollection (see id., p. 8, line 27 to p. 9, line 4; p. 12, lines 7-8, 22-26; p. 14, lines 8-10, 24-28; p. 18, lines 12-16; p. 19, lines 14-20; Jesse Supp.Aff., p. 2, lines 13-15, 17-21; p. 3, lines 14-16).

either that Mr. Jesse had any additional information to impart or that his recollection had in any way improved.

Thus, the evidence before the district court unequivocally established that Mr. Jesse had in fact been involved in matters substantially related to this litigation. The offered oral testimony would not have added to nor detracted from that conclusion (see, e.g., *Geralnes B.V. v. City of Greenwood Village, Colo.* (D.Colo. 1985) 609 F.Supp. 191, 192 (disqualification motion submitted on affidavits, memoranda, exhibits, deposition testimony and hearing exhibits satisfied hearing requirements)).

The cases cited by Double Rainbow are inapposite. The record was virtually nonexistent in *Fullmer v. Harper* (10 Cir. 1975) 517 F.2d 20, overruled on other grounds, *Firestone Tire & Rubber Co. v. Risjord* (1981) 449 U.S. 368 and in *Melamed v. ITT Continental Baking Co.* (6 Cir. 1976) 534 F.2d 82, overruled on other grounds, *Melamed v. ITT Continental Baking Co.* (6 Cir. 1979) 592 F.2d 290. In *Fullmer,* the *only* "evidence" was a verified motion; the trial court did not even require a written response (517 F.2d at 21). In *Melamed,* the evidentiary record consisted of a solitary affidavit filed by the moving party (534 F.2d at 84).

III. THE DISTRICT COURT PROPERLY RULED THAT THE "CHINESE WALL" DEFENSE WAS NOT AVAILABLE.

Double Rainbow erroneously contends that "[s]creening procedures and safeguards such as those instituted by Gray, Plant have generally been found acceptable" by the courts as a defense to disqualification motions (Pet., p. 18). Even if a "Chinese Wall" defense were available as a general matter—which it is not—Double Rainbow would not be entitled to its benefit under the facts of this case. The purported screening procedure was not effected until well *after* Gray, Plant became aware of the potential conflict and *after* it had been asked to disqualify itself. To be effective, a "Chinese Wall" must be constructed before the potentially disqualifying event occurs, i.e., when the attorney subject to disqualification first joins the firm or when the firm accepts the case (*LaSalle Nat. Bank v. County of Lake* (7 Cir. 1983) 703 F.2d 252, 259). Double Rainbow has failed to cite a

single case to the contrary. Instead, it has cited three cases that support this very point (*Smith v. Whatcott,* supra, 757 F.2d 1098; *Analytica, Inc. v. NPD Research, Inc.* (7 Cir. 1983) 708 F.2d 1263; *LaSalle Nat. Bank v. County of Lake,* supra, 703 F.2d 259).

Moreover, the only two cases cited by Double Rainbow where disqualification was avoided on the basis of a "Chinese Wall" defense involved former *government* attorneys (*Armstrong v. McAlpin* (2 Cir. 1980) 625 F.2d 433 (former SEC lawyer), vacated on other grounds (1981) 449 U.S. 1106; *Kesselhaut v. United States* (Ct.Cl. 1977) 555 F.2d 791 (former FHA, HUD lawyer)). As is indicated by the authority cited by Double Rainbow, courts have found "Chinese Walls" to be effective, if at all, almost exclusively in the context of a firm employing a former government attorney.[6]

Double Rainbow also cites a Minnesota state court case, *Jenson v. Touche Ross & Co.* (Minn.S.Ct. 1983) 335 N.W.2d 720, to support its contention that Gray, Plant's "internal screening procedures" should preclude disqualification (Pet., p. 20). In *Jenson,* however, the court determined that the equities weighed against disqualification because the litigation had been pending for five years and the firm sought to be disqualified had a long-standing prior relationship with its current client. The court, sua sponte, ordered the establishment of a "Chinese Wall" as a form of limited relief for the losing party. In the present case, Gray,

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[6] Courts have drawn a distinction between government and private attorneys—a difference attributable to the importance of attracting qualified attorneys to government service. Potential employers are likely to be reluctant to hire government attorneys who might turn out to be "Typhoid Marys" capable of infecting an entire firm with their disability (see *Kesselhaut v. United States,* supra, 555 F.2d at 793). Screening procedures for former public employees are usually justified in this context because of the role that they play in enabling the government to recruit highly qualified lawyers for public service (Developments in the Law, Conflicts of Interest in the Legal Profession (1981) 94 Harv.L.Rev. 1244, 1364). The American Bar Association has incorporated this distinction into the Model Rules of Professional Conduct (compare Rule 1.10 (Imputed Disqualification: General Rule) with Rule 1.11 (Successive Government and Private Employment)).

Plant had no long-standing relationship with Double Rainbow, the litigation is in its earliest stages, and Double Rainbow continues to be represented by able California counsel.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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